# FREEDOM OF EXPRESSION IN THE MEDIA: THE PUBLIC'S CLAIM FOR A RIGHT OF ACCESS

## I. INTRODUCTION

The advent of electronic media has been accompanied by the assertion of first amendment free speech interests by both broadcast license holders and the listening and viewing public. The unique nature of government regulated media for expression has brought constitutional guarantees into play, but no clear-cut standard for determining whose interests should predominate has been developed. The focal point of the debate involves the presentation and treatment of controversial issues of public significance, such as foreign policy, pollution and fiscal policy, among others. The power of presentation has heretofore been in the hands of the broadcasters, who wield virtually unlimited control over the subject matter, perspective and mode of that which fills the airwaves daily. The only restriction imposed upon license holders with respect to controversiality is adhesion to a general guideline of fairness.

The opposition to this asserts both a lack of compliance with fairness standards and a constitutional infirmity in vesting complete control of media of expression in the hands of those who are merely licensed to operate the facilities as a commercial venture. Emphasis is on the latter argument, with particular reference to the inconsistency of the concept of freedom of expression with the current system of exclusive control. A counter-argument holds that a well articulated and carefully supervised policy requiring fairness in presentation will cure present inequities and offset any detriment to freedom of expression that prevails under the present system of exclusive control by broadcasters. This note explores the strength of both sides of the controversy, examining constitutional and non-constitutional arguments, and analyzing one federal case, *Business Executives' Move for Vietnam Peace v. FCC*,[1] which marks a significant breakthrough for those who advocate a right of access. The court held that the first amendment does not allow a broadcaster to reject paid public issue advertisements while accepting paid commercial advertisements and directed the FCC to establish reasonable administrative regulations to deal with editorial advertising. Whatever the practical difficulties of implementation of the court's order,[2] the judicial recognition of a conclusive but limited right of access to the electronic media was long overdue.

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[1] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971) (consolidated for hearing with Democratic National Committee v. FCC), *cert. granted*, —— U.S. ——, 31 L. Ed. 2d 230 (1972).

[2] *See* 85 HARV. L. REV. 689 (1972).

## II. History of the Fairness Doctrine

Governmental control of the electronic media did not begin until the creation of the Federal Communications Commission. At that time television was still in its infancy, but radio was well established as one of the most effective vehicles for the presentation of ideas. The express purpose of the FCC was to insure that both radio and television would never function inconsistently with "public convenience, interest, or necessity. . . ."[3]

The FCC did not feel compelled to promulgate any specific rules regarding first amendment rights until 1949. At that time, pursuant to the power delegated to it by Congress, the FCC formally announced its policy with respect to editorial opinions and expression by broadcast licensees. The FCC recognized the "paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning . . . vital and often controversial issues which are held by the various groups which make up the community."[4] This meant that a licensee was obligated to present news and comment "on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise."[5] This principle quickly evolved into the fairness doctrine, which was to be the guide for all future policy decisions involving the interaction of free speech and the electronic media. The import of the doctrine is that a licensee must present all sides of any controversial public issue if he presents any side at all. For example, a station campaign to encourage passage of a tax levy would have to give some (but not necessarily equal) time to opponents as well as proponents of the issue. The requirement is simply that once a controversial issue is raised, the public must be given a "reasonable" cross-section of representative views on it.

The constitutionality of the fairness doctrine went unquestioned at the time of its publication. Though Congress has never legislated with respect to the fairness doctrine itself, support for the FCC's policy can be inferred from the 1959 amendment to the equal time provision for political candidates,[6] which stated in part that "[n]othing in the foregoing sentence shall be construed as relieving broadcasters . . . from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[7] In response to a growing number of fairness com-

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[3] Communications Act of 1934, 47 U.S.C. § 303 (1964).

[4] Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949) [hereinafter cited as Editorializing Report].

[5] *Id.* at 1250.

[6] 47 U.S.C. § 315 (1964).

[7] Act of September 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557, *amending* 47 U.S.C. § 315(a) (1964).

plaints which centered largely around the lack of substantive guidelines associated with the fairness doctrine, the FCC published the "Fairness Primer".[8] This public notice reiterated the role of the fairness doctrine in situations of broadcast facilities being used for the discussion of controversial issues of public importance and further sought to clarify ambiguities inherent in its application. The method adopted was a digesting of FCC rulings on what qualified as a controversial issue of public importance,[9] the nature of the licensee's obligation to afford reasonable opportunity for the presentation of contrasting viewpoints,[10] what constituted a reasonable opportunity,[11] what limitations a licensee could impose,[12] and what obligations accrued to the licensee in situations of personal attacks[13] and editorializing.[14] Each category represented undisturbed rulings of the FCC, except for licensee editorializing, which simply contained the assertion that editorializing was subject to fairness doctrine constraints, but that the licensee was under no affirmative obligation to editorialize.[15] It was the applicability of the fairness doctrine to personal attacks and licensee editorializing that ultimately invoked Supreme Court intervention in its only comprehensive statement on the subject, *Red Lion Broadcasting Co. v. FCC*.[16]

*Red Lion* was a consolidation of two cases, one involving the constitutionality of the fairness doctrine's requirement of reply time for an individual personally attacked on the licensee's facilities, and the other involving specific regulations adopted by the FCC governing both personal attacks and political editorials as mentioned in the Fairness Primer. The broadcasters in each case sought to have the FCC rulings overturned as unconstitutional abridgments of their freedoms of speech and press. In a far reaching decision, a unanimous Supreme Court emphatically upheld the fairness doctrine, noting the "public interest" responsibility that inheres in the exclusive dominion over a broadcast frequency and stating that "we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority."[17] On the issue of free speech, the Court pointed out that "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends

[8] Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964) [hereinafter cited as Fairness Primer].

[9] *Id.* at 10416.

[10] *Id.* at 10418.

[11] *Id.* at 10419.

[12] *Id.*

[13] *Id.* at 10420.

[14] *Id.* at 10421.

[15] *Id.*

[16] 395 U.S. 367 (1969).

[17] Red Lion v. FCC, 395 U.S. 367, 385 (1969).

and purposes of the First Amendment."[18] In addition, the court stated that "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."[19]

## III. Impact of the Fairness Doctrine

Although *Red Lion* marked a significant victory for advocates of the fairness doctrine, it left untouched the inequities that were developing in the implementation of the doctrine. These inequities were a result of the gap between the doctrine's broad mandate of reasonable representation of contrasting views and the practical difficulties of enforcement in light of the voluminous and diverse expression that fills the airwaves.

### A. *Fairness Doctrine Standards*

One of the most litigated problems involves the establishment of discernible standards for invoking the fairness doctrine. The original and lone criterion laid down by the FCC is "whether a controversial issue of public importance is involved. . . ."[20] The difficulty inheres in defining the terms "controversial" and "public importance." Surprisingly, some topics which may be thought of as inseparable from a connotation of controversial are, in fact, insufficiently controversial to meet the somewhat nebulous standards of the FCC. Religion is just such a topic; prominent in numerous public modes are the "is God dead?" debates and court decisions concerning prayer in the public schools. In *Madalyn Murray*[21] religion's controversiality disappeared. A majority of the Commissioners did not think the broadcast of church services, devotionals, and prayers required allocation of time to respond for anti-religious groups,[22] and two concurring Commissioners thought that religion raised no controversial issue whatsoever. The only way a controversy could develop, said the Commissioners, would be "if a sermon in a religious broadcast presents a viewpoint on a controversial issue of public importance, such as a bond issue or the nuclear test ban treaty. . . ."[23] Another public issue is that of military conscription. Military recruitment announcements have resulted in several suits asserting the applicability of the fairness doctrine. In *David C. Green*[24] the Commission determined that solicitation of recruitment

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[18] *Id.* at 390.

[19] *Id.*

[20] Fairness Primer, *supra* note 8, at 10416.

[21] 40 F.C.C. 647 (1965).

[22] *Id.*

[23] *Id.* at 665 (Henry and Cox, Comm'rs., concurring).

[24] 24 F.C.C.2d 171 (1970).

could raise the controversial issue of "whether the United States at this time should maintain armed forces" and also the controversial issue of the propriety of the draft system.[25] However, in *Alan F. Neckritz*[26] and *San Francisco Women for Peace*[27] the Commission reviewed similar recruitment announcements, but stated that no controversial issue had been raised.[28]

An apparent inconsistency has also developed in the context of the fairness doctrine and commercial advertising. In *Banzhaf v. FCC*[29] the court of appeals affirmed, but narrowed, a Commission decision declaring the fairness doctrine applicable to cigarette advertising. The standard settled upon was that if the use advocated posed a threat "to life itself" the opposing view deserved representation.[30] But in *Friends of the Earth*[31] the Commission said that an environment group failed to establish that automobile and gasoline advertisements advocated the use of something which posed a sufficient public health problem, air pollution. Although the FCC reached a contrary result, *Friends of the Earth* differed little in its approach to a controversial issue of public importance, as was indicated by Commissioner Johnson in his dissent when he noted that the only relevant question is whether or not advocacy of use raises an issue of controversy and public importance sufficient to invoke the fairness doctrine.[32]

B. *Some Fairness Doctrine Problems*

Aside from semantical considerations, there exists the question of proper disciplinary action by the FCC when a complaint results in the discovery of a legitimate fairness doctrine violation. The sanction available to the FCC is revocation of a broadcasting license for the wilful or repeated violation of any rule or regulation of the FCC,[33] and licenses must be renewed every three years. However, prior to *Red Lion*, non-renewal had never been imposed for enforcement of the fairness doctrine, and probationary renewal of less than the maximum three year period was highly infrequent. The problem, of course, is that such a sanction is inordinately harsh for a small or unintended infraction of the doctrine. The most appropriate system of adjudication would combine expediency with a sanction comparable to the severity of the violation.

Several other problems exist which are inherent in the fairness doctrine,

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[25] *Id.* at 172.

[26] 24 F.C.C.2d 175 (1970), *aff'd*, 446 F.2d 501 (1971).

[27] 24 F.C.C.2d 156 (1970).

[28] Alan F. Neckritz, 24 F.C.C.2d 175, 176 (1970); *accord*, San Francisco Women for Peace, 24 F.C.C.2d 156, 157 (1970).

[29] 405 F.2d 1082 (D.C. Cir. 1968).

[30] *Id.* at 1097.

[31] 24 F.C.C.2d 743 (1970).

[32] *Id.* at 753 (Johnson, Comm'r., dissenting).

[33] 47 U.S.C. § 312(a)(4) (1964).

but not as readily susceptible of overt analysis as those discussed above. One of the most frequent allegations is that the fairness doctrine, which is intended to maximize the exchange and dissemination of ideas, actually operates to inhibit free expression. This stems from the fact that, as the licensee is under no affirmative obligation to present any controversial issue whatsoever, he may avoid any issue which might require either expenditures in order to comply with the fairness doctrine or result in possible litigation and sanction; hence broadcasting is, on the whole, more bland than it would be without the fairness doctrine. Indirect influences upon programming may also severely distort the intent of the fairness doctrine, yet not be reached by utilization of the doctrine. No doubt a commercial sponsor's opinion about the nature and quality of a broadcast station can be very influential. That opinion might easily impede the objectives of the fairness doctrine and the first amendment itself by persuading the licensee to retreat behind the "no affirmative obligation" shield when ideas, the adverse of which are objectionable to the sponsor, are available to the licensee for presentation. Such a situation is far from unimaginable in an industry that is heavily dependent upon those very sponsors for economic livelihood.

## IV. JUSTIFICATION FOR A RIGHT OF ACCESS

Increasing difficulty with the fairness doctrine has prompted speculation as to constitutional theories which might make the media more responsive to the public's first amendment rights. A theory heretofore rejected by the FCC is the "right of access" theory, which holds basically that the public is entitled to pay for and communicate its ideas on public issues through the media in the same manner that a commercial advertiser does. The theory has finally acquired judicial approval through *Business Executives' Move for Vietnam Peace v. FCC*,[34] in which the court decisively announced the existence of a limited right of access to the media held by the public.

Business Executives' Move for Vietnam Peace (BEM) is a national organization dedicated to ending the war. It believed that one effective method of demonstrating its opposition would be to broadcast spot announcements on local radio stations in much the same way commercial advertisers do. Station WTOP in Washington, D.C., refused, over a period of eight months commencing in June, 1969, to sell any time to BEM. The reason given was not any management disposition towards the anti-war announcement, but rather a long standing station policy of not selling time to any group seeking to influence the public on controversial issues.

To persuade the court of appeals to reverse the FCC holding against a

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[34] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971).

right of access,[35] BEM sought to establish that: (1) radio is an appropriate forum to which first amendment constraints should apply; (2) the fairness doctrine fails to fully protect the public's first amendment interests in free speech in the media; and (3) a right of access cures the constitutional defects of the fairness doctrine, yet does not lose its constitutionally preferred position by virtue of creating undue hardships on the licensees.

A. *Radio Stations Subject to First Amendment Constraints*

That the first amendment does not apply to private individuals or corporations is both self-evident[36] and well entrenched in judicial opinion. It "limits only the action of Congress or of agencies of the federal government. . . ."[37] It is, however, applicable to the states through the fourteenth amendment. Since BEM had requested advertising on a privately owned radio station, the first obstacle to invoking first amendment rights was to show why the guarantee of freedom of expression must be observed by a business corporation. In short, it had to be proven that not only is the government prohibited from interfering with a licensee's right to free speech, but that a licensee is obligated to respect the public's free speech interest in the media that he controls.

The "state action" exception to first amendment immunity is the vehicle for such proof, though only by analogy to the prevailing conception of the constitutional doctrine:

> The reach of the First Amendment, therefore, depends not upon "public" —"private" technicalities, but upon more functional considerations. They are (1) the governmental involvement in or public character of a particular enterprise, and (2) the importance or suitability of that enterprise for the communication of ideas.[38]

Case support is abundant for the conclusion that radio stations are within the reach of the first amendment under both suggested standards.

In *Marsh v. Alabama*[39] the Supreme Court held that members of a religious sect could not be prevented from distributing religious literature in a town that was wholly privately owned. The rationale was that a town is of such a "public character" that no individual or company could assume the functions of government without respecting constitutional guarantees. More closely analogous to the concept of broadcasting as state action is *Burton v. Wilmington Parking Authority*,[40] in which the state leased property to a restaurant which discriminated on the basis of race. Although

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[35] Business Executives' Move for Vietnam Peace, 25 F.C.C.2d 242 (1970).

[36] U.S. CONST. amend. I provides, in part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

[37] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 650 (D.C. Cir. 1971).

[38] *Id.* at 651.

[39] 326 U.S. 501 (1946).

[40] 365 U.S. 715 (1961).

distinguishable as a case grounded in equal protection, the similarity of licensing and leasing is strong, especially in light of the similarity of the concepts of franchising and broadcast licensing. Directly in point is *Public Utilities Comm'n v. Pollock*,[41] a case which held that a transit authority regulated by a federal governmental agency (in Washington, D.C.) was subject to first amendment constraints by virtue of that regulatory relationship. A plethora of equally pertinent cases and authority[42] would seem to make the conclusion of first amendment applicability to radio inescapable.

B. *Adequacy of the Fairness Doctrine*

The fairness doctrine discussed above has been advanced as the media's shield against constitutional attack. The question of whether or not a right of access is constitutionally compelled is never reached, so goes the argument, if the fairness doctrine sufficiently protects the public's free speech interests. The adequacy of the fairness doctrine can only be determined, however, by juxtaposing the requirements it makes of the licensee with the scope and extent of the public's first amendment rights.

The court in *BEM* held that the public has three very crucial interests in the media: the public has a first amendment interest in the mode or manner—as well as the content—of public debate aired on the broadcast media, in vigorous, "wide-open" public debate, and in effective self-expression.[43] The key to the argument for a right of access hinges upon the interest of self-expression, which basically means that "[w]e all have an interest in speaking up ourselves as well as in hearing others."[44] If the fairness doctrine does not provide for the actualization of that interest, then it is constitutionally defective. The court clearly rejected the notion that the fairness doctrine is sufficient to preserve the public's interest in self-expression. In fact, it noted two distinct shortcomings. First, since the initiative as to what is to be presented is, without exception, at the discretion of the licensee, the system must necessarily conform to a "paternalistic structure in which licensees and bureaucrats decide what issues are 'important,' how 'fully' to cover them, and the format, time, and style of the coverage."[45] Inherent biases, therefore, would always prevent optimum fairness so long as the licensees exercise all the initiative. Second, the broadcaster's editing control will invariably result in a less than fully informed public, even if the bias is a product of simple oversight.[46]

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[41] 343 U.S. 451 (1952).

[42] *See, e.g.*, Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1969); Business Executives' Move for Vietnam Peace, 25 F.C.C.2d 242, 249 (1970) (Johnson, Comm'r., dissenting).

[43] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 655 (D.C. Cir. 1971).

[44] *Id.* at 655.

[45] *Id.* at 656.

[46] *Id.* at 657.

C. *Establishing a Right of Access*

Once the defense of the fairness doctrine is laid to rest, the two-pronged issue that remains is: (1) does a right of access overcome the shortcomings of the fairness doctrine; and (2) does its importance outweigh the possible detriment to the licensees. The efficacy of requiring licensees to accept some editorial advertising is implicit throughout the court's opinion. The terminology lends itself to justification under the court's standard, *e.g.*, the word "access" obviously allows for entry into a given field, which goes to the issue of initiative for introducing or commenting upon issues of public importance being shared by the licensee and the public. In the case of editing and format, absent censorship by the broadcaster, the individual or group seeking access can devise an editorial advertisement in whatever manner or mode deemed appropriate for expressing a particular perspective. The conclusion reached by the court was that "the fairness doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, complementary airing of controversial views during advertising time."[47]

The ability of a right of access to rectify existing deficiences does not, in and of itself, compel its adoption. First amendment rights depend upon the context in which they are to be upheld. Justification for governmental abridgment has been the subject of intense litigation, beginning with the original "clear and present danger" standard.[48] Due to the variety of contexts in which first amendment rights arise, it is necessary to determine which test is applicable before reaching the question of whether or not the facts, as related to the test, establish a right of access.

The first standard discussed by the court was the "access to forums" test, which "is an exercise in balancing, though weighted in favor of First Amendment values."[49] Hence the value of granting free speech is balanced against the "importance of other uses of the forum which may be threatened and the extent to which they actually will be disrupted."[50] The disruptive effect must override the "preferred" first amendment right. The propriety of utilizing this test rests on two assumptions. First, the court must equate access to a place of communication, for example, a public park, with access to a medium of communication. The court perceived little difficulty in such an equation, relying both on the internal logic of such an analogy and on recent, confirming authority in similar cases for such a conclusion.[51] The second assumption is that since the first amendment rights of both the public *and* the licensee are at issue, one should predomi-

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[47] *Id.* at 658.

[48] Schenck v. United States, 249 U.S. 47 (1919).

[49] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 659 (D.C. Cir. 1971).

[50] *Id.*

[51] *Id.* at n.41.

nate and thereby be recognized as deserving the "preferred" position in a balance of interests. Placing the public's right to be fully informed above that of the licensee to broadcast what he wishes seems to be a natural product of the public's "paramount" right in the media.[52]

The second standard explored by the court was the compelling interest aspect of the "new" equal protection. Basically the doctrine holds that where a state discriminates either on the basis of a suspect criterion, for example, race, or in the deprivation of a fundamental right, for example, free speech, that such state action can be justified only by the showing of some "compelling interest" being served. Stated another way, either action constitutes a prima facie constitutional violation. The court suggested that both branches may be available for invoking the strict standard of review. On one hand, discriminating between commercial advertisers and editorial advertisers utilizes a suspect criterion, because to allow some public speaking implies a lack of objection to public speaking in general,[53] and on the other hand, to prevent editorial advertising is to infringe the fundamental right of freedom of speech,[54] hence the broadcaster's policy must be supported by a compelling state interest.

With these alternatives before it, the court declined to choose just one, but rather combined them into what it called "a very heavy burden of justification."[55] The FCC, in turn, characterized this burden as: (1) throwing the program equation off balance; (2) favoring those private interests who can afford to dominate available advertising time; (3) usurpating of the licensee's authority in judging what constitutes adequate coverage; and (4) financially oppressing licensees granting free time to groups opposing the view of a paid editorial who cannot afford to purchase time.[56]

Far from finding these considerations a heavy burden, the court seemed to feel that they are almost no burden at all. The "lost authority" argument was dismissed on the grounds that "[s]uch a modest reform would not substantially undermine broadcasters' editorial control over their frequencies."[57] This conclusion was apparently drawn from the often repeated admonition that the decision only requires broadcasters to accept *some* editorial advertising, in accordance with such "reasonable regulations" as the FCC may develop. Further, these "reasonable regulations" will permit the FCC to prevent abuses of the right of access by wealthy interest groups, thus disposing of the "money domination" argument. Likewise, reasonable limits on the number of advertisements that need be accepted

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[52] Red Lion v. FCC, 395 U.S. 367, 390 (1969).

[53] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 660 (D.C. Cir. 1971).

[54] *Id.* at 660.

[55] *Id.* at 662.

[56] Brief for Respondent at 22-25, Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971).

[57] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 663 (D.C. Cir. 1971).

will avoid the "economic ruin" anticipated by the FCC as a result of the interaction of a right of access with the fairness doctrine's requirement of free time if need be to respond. The court's final determination was that "[g]iven a scheme of reasonable regulation, there is no reason why acceptance of editorial advertising should cause any substantial harm or disruption not already involved in the acceptance of other advertising."[58]

## V. Breadth and Scope of the Decision

Before examining the soundness of the court's reasoning, it should be noted that two distinct constitutional approaches emerged, and it is not entirely clear which was being relied upon. On the one hand, an analysis of the fairness doctrine reveals constitutional deficiencies that are inseparable from its administration and consequently render it unconstitutional. The deficiencies arise from a lack of opportunity for self-expression, since all initiative and editing control of media coverage for controversial public issues rests with the licensee. The court believed that a limited right of access overcame these deficiencies without creating any undue burden on the licensee. However, the court also indicated that the public has a "paramount" right in the operation of the media, hence an offer of air time to one segment of the public, commercial advertisers, means that it must be made available to the public in general. This latter approach disdains any compromise between the constitutional rights of the public as opposed to those of a licensee, positing the right of access as independent of other doctrinal policy.

### A. *Two Rationales for a Right of Access*

Those who contend that the fairness doctrine is constitutionally defective believe that the public has an interest in the media as speakers, as well as viewers and listeners. Without this premise, the deficiencies mentioned above disappear, along with any need for a right of access. The premise is open to two opposing lines of argument: (1) that the public does not have an interest as speakers; and (2) that, assuming that some speaking interest exists, the fairness doctrine satisfies it.

The first line of argument was adopted by the FCC in its original opinion. BEM there claimed that the Supreme Court's language in *Red Lion* describing "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences"[59] evidenced that Court's belief in the public's right as speakers. The FCC dismissed this with the observation that "it is clear that in this passage the Supreme Court was stressing the essential nature of the fairness doctrine, rather than the right of a particular spokesman to obtain access to the air, except in

[58] *Id.* at 665.

[59] Red Lion v. FCC, 395 U.S. 367, 390 (1969).

cases of personal attack and editorials endorsing or opposing political candidates."[60] The second line of argument was employed in the dissent in *BEM* in the court of appeals. This argument asserts that whatever right to speak might exist does not, in and of itself, compel a right of access if it is reasonably satisfied under the fairness doctrine. Rather, it is subsumed under a general right to know and the fairness doctrine "provides a mechanism for implementation of the public's right to know which, by and large, has been effective."[61]

The "paramount right" approach avoids all discussion of the fairness doctrine and the specific elements of the public's first amendment rights in the media. This is accomplished by examining advertising in general from an equal protection standpoint. This is to say that discriminating against editorial advertisers, as opposed to commercial advertisers, amounts to using a suspect criterion, *i.e.*, the content of ideas, which is constitutionally prohibited absent a compelling state interest.[62]

Little attention was paid by the court to the process of getting from a "federal government involvement" finding to the strict standard of review associated with equal protection. Though the court did point out that "[t]he Fourteenth Amendment does not apply to federal regulation of the broadcast industry, since no interference with the states is involved,"[63] it later, and without explanation, stated that "discrimination apparently based on the content of ideas presents an additional, or greatly heightened, prima facie constitutional violation. Both free speech and equal protection principles condemn any discrimination among speakers which is based on what they intend to say."[64] One must assume that the court either did not notice this apparent inconsistency, or felt it unnecessary, for some reason, to explain it. Either alternative leaves the unanswered question of whether an equal protection standard of review can be properly invoked under circumstances of federal agency regulation. The problem, however, is not so much one of analytical difficulty as it is one of infrequency. Situations of alleged equal protection violation by the federal government or its duly authorized agencies are relatively rare. The Supreme Court has said that due process, as embodied in the fifth and fourteenth amendments, and equal protection, as applied to the states through the fourteenth amendment, are both directed toward the ideal of fairness, and are not mutually

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[60] Business Executives' Move for Vietnam Peace, 25 F.C.C.2d 242, 247 (1970).

[61] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 666 (D.C. Cir. 1971) (McGowan, C.J., dissenting).

[62] The other branch of the equal protection argument, which holds that the deprivation of a fundamental right such as freedom of speech requires a compelling state interest, rests upon the assumption of a public interest in speaking, hence it is subject to the same objections raised above in the defective fairness doctrine discussion.

[63] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 650 n.13 (D.C. Cir. 1971).

[64] *Id.* at 660.

exclusive.[65] In declaring school segregation in the District of Columbia violative of due process, the Supreme Court said that, although due process and equal protection are not always interchangeable, "[l]iberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."[66] Since that time the scarce litigation involving the issue has sustained the proposition that the abstract principle of equal protection is equally applicable to state and federal government alike.[67]

Equating a forum or place of communication with a means of communication, albeit without precedent, should not raise objection. To distinguish the interests that attach to a public forum, such as a park, from those that attach to television and radio for purposes of guaranteeing an open marketplace of ideas would be at best tenuous, and, to date, has not been advanced. The only remaining untested premise of the "paramount right" approach is that discrimination against political advertisers in favor of commercial advertisers is sufficiently invidious to require a compelling state reason.

B. *The Court's Choice.*

Considering the rationale of the two approaches suggested by the court, together with their respective points of possible vulnerability, it is appropriate to determine which, if either, represents the court's ultimate grounds for a right of access. Despite the fact that attack is advanced against the "defective fairness doctrine" idea by opponents of a right of access, it can be strongly argued that the opinion of the court is properly construed as holding for a right of access regardless of the successful or unsuccessful operation of the fairness doctrine. To be sure, the court refuted both lines of argument. The right of the public to receive ideas was spoken of as a public interest, but not its *only* interest, in the media.[68] An additional, and more important right, is the right of self-expression, which can only be realized through recognition of a right to speak. The rationale underlying this conclusion is that "[t]he First Amendment values of individual self-fulfillment through expression and individual participation in public debate have long been recognized."[69] Such a position is quite tenable: what value, it may be asked, would a right to receive have if exclusive control over who may speak is in the hands of the broadcaster? The media could represent both ideological sides of the Vietnam war without the public ever learning that an organization of over 2,700 business owners and execu-

[65] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[66] *Id.* at 499-500.

[67] *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 641 (1966).

[68] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 654 (D.C. Cir. 1971).

[69] *Id.* at 655.

tives had combined for the express purpose of voicing opposition to the war. Hence the deprivation of initiative permitted under the fairness doctrine violates an essential aspect of the public's freedom of expression. Likewise, the licensee's exclusive control of editing and format instills an unavoidable bias in all issue presentation, largely because the condensing and abbreviating process must necessarily reflect what the broadcaster considers to be important and interesting.[70] The truth of this conclusion is even less disputable than the gravity of the problem. The importance of the format, time, and mode of presentation to the impact of an idea, for instance as publicized by Marshall McLuhan,[71] exemplifies an increasing awareness by the academic world of the enormous amount of power held by those who control the media.

It is interesting to note that the court, in refuting the arguments advanced in favor of the fairness doctrine, has built an insurmountable barrier to its ever being adequate. This is because there is no authority for compelling the licensee to relinquish editing control or the power of initiating issues. The fairness doctrine is simply not adequate to fully protect the public's first amendment interests in the media. Why, then, does the court construct a theory of discrimination against controversial ideas being prima facie unconstitutional in light of the public's "paramount right" in the media? The reason would seem to lie in the implications of proving discrimination, as opposed to proving a defective fairness doctrine. It does not follow from the fact that a particular procedure fails to provide the public with initiative and editing control in the media, that a right of access is constitutionally required. There may be alternatives which can both satisfy the first amendment and yet avoid declaring an absolute, though limited, right of access. But it does follow that if an unconstitutional discrimination among ideas is being made based upon their content, then a cessation of discrimination is constitutionally required. A right of access becomes a necessary rather than a permissible alternative. This is analogous to saying that once racial discrimination has been proven, the operation of a separate-but-equal doctrine, or any other mitigating procedure, is entirely irrelevant because the discrimination itself is unconstitutional. Strength for this characterization is evidenced by the fact that the court did not remand this case for a determination of how the public's first amendment rights might better be protected, but rather declared that "to single out and exclude editorial advertising is to violate the First Amendment of the Constitution."[72]

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[70] *Id.* at 655-56.

[71] H. MCLUHAN, THE MEDIUM IS THE MASSEGE (Random House ed. 1967).

[72] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 665 (D.C. Cir. 1971).

C. *The Public's Paramount Right*

Determining which constitutional argument the court relied upon in fashioning a right of access does not, of course, reflect upon the soundness of that argument's reasoning. Assuming arguendo the validity of the underlying assumptions that a medium of communication is constitutionally comparable to a place of communication, and that equal protection standards can be applied to the federal government, it must still be shown that discrimination based upon the content of ideas is constitutionally prohibited and that the practical difficulties of allowing a limited right of access do not constitute a "compelling" or "overriding" state interest. Traditional equal protection review was limited to situations of invidious discrimination, the most common being arbitrary classifications based on race, color, or national origin. Prohibition of discrimination by content of ideas is a relatively new concept, but has received unbroken judicial support since its inception. The general principle is that a forum, once open to some form of communication, even if privately owned, must not be used in a manner allowing arbitrary censorship of selected ideas. The six cases cited by the court as supporting its ban against "discriminations among types of speech"[73] were discussed in detail by Commissioner Johnson in his dissent from the FCC's original ruling against BEM.[74] The forums in which commercial advertising was accepted and political advertising strictly forbidden were a college newspaper,[75] a high school newspaper,[76] the New York subway,[77] and two municipal bus lines.[78] Without exception, it was held that the policy of forbidding editorial advertising when paid commercial advertising was accepted amounted to unconstitutional censorship of free speech.

It is difficult to imagine any reasonable method of distinguishing the policy against political advertising condemned in the above cases and that applied by the licensee to BEM. Subway walls, newspaper pages, and buses (both exterior and interior) are, together with radio and television, the business world's most common method of reaching potential customers. All function in an identical manner, attempting to communicate an idea, albeit commercial, to the masses of people coming into contact with the particular forum. The FCC asserted that the above cases are inapposite because the forums are "government affiliated entities whose major pur-

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[73] *Id.* at 659.

[74] Business Executives' Move for Vietnam Peace, 25 F.C.C.2d 242, 268-71 (1970) (Johnson, Comm'r., dissenting).

[75] Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971).

[76] Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).

[77] Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967).

[78] Hillside Community Church, Inc. v. City of Tacoma, 455 P.2d 350 (Wash., 1969); Wirta v. Alameda-Contra Costa Transit District, 68 Cal. 2d 51, 64 Cal. Rptr. 430 (1967).

poses are for the most part unrelated to informing the public and who are in any event under no statutory duty to do so."[79] Such a distinction would seem, however, to make a better case for the analogy than against it, as a forum that exists for the express purpose of communication especially ought to be susceptible to first amendment constraints. Indeed, the reaction of the courts has been one of indignation at the "perversity of elevating commercial speech to a status more important than political speech."[80] Broadcast licensees are hard pressed to escape the analogy that invalidates a policy that discriminates against political ideas yet allows commercial ones, absent, of course, sufficient countervailing facts.

The final argument by which the FCC might have attempted to disprove a limited right of access would have been a positive showing of practical burdens sufficient to at least override the public's free speech interests. Although this is where the licensee's specific objections to a right of access might best be argued, it is an area that was almost completely ignored by the FCC. Addressing itself to the question of BEM's first amendment rights in its original ruling, the FCC said merely that a licensee may exercise his judgment as he sees fit, and that "[i]f the licensee were required to present any matter brought to him which was not obscene, etc., the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt."[81] This criticism seems to be directed toward an *unlimited* right of access. Were that the issue, it might be of some merit, but standing alone, it hardly defeats a limited right of access.

On appeal, the FCC asserted that the policy considerations were not in issue in *BEM* and hence the court should not even consider them in relation to a right of access.[82] The reasoning was that the FCC properly found that the public's free speech rights did not include a right to speak, but rather only a right to receive that which the licensee, in conformity with the fairness doctrine, chose to disseminate, hence the question of what policy considerations might outweigh such a right were not at issue. This followed from the distinction made by the FCC that the cases in point regarding discrimination against the content of ideas were inapplicable. The FCC did point out what it considered to be some of the problems with a right of access, but said that "[w]e have attempted no detailed analysis because this would appear to be plainly an area where the Commission's reasoning rather than the arguments of counsel should be before the

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[79] Brief for Respondent at 17, Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971).

[80] Business Executives' Move for Vietnam Peace, 25 F.C.C.2d 242, 269 (1970) (Johnson, Comm'r., dissenting).

[81] *Id.* at 248.

[82] Brief for Respondent at 20, Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971).

Court."[83] Past this somewhat cryptic introduction, the FCC characterized a licensee's burden as: (1) chaos resulting from a loss of broadcaster control; (2) control of access by wealthy interests, and; (3) financial ruin by virtue of the fairness doctrine's requirement of reply time to editorial messages which must be free of charge when necessary.[84]

Arguments (1) and (3) were dismissed by the court rather summarily with a reminder of the narrowness of the holding. Neither chaos nor financial ruin need be the product of a requirement permitting *some* editorial advertising. Such consequences will not materialize so long as the FCC and licensees utilize their "broad latitude to develop 'reasonable regulations' which will avoid any possibility of chaos and confusion."[85] The more difficult problem is that of possible domination of a right to access by wealthy groups or individuals. While acknowledging the seriousness of this claim, the court approached the problem with the view that "the mere fact that wealthy people may use their opportunities to speak more effectively than other people is not enough to justify eliminating those opportunities entirely."[86] The solution to inequities rests again on the "Commission's ability to set down guidelines which avoid that danger."[87] The ease with which the court disposed of the Commission's arguments is surely due, in no small part, to the lack of importance attached to and thought devoted to their preparation. In underestimating the constitutional limits of inquiry to be reached by this court of appeals, the Commission failed to explore and develop the genuine difficulties that might have at least prompted the court to articulate a less simplistic solution. As advanced, the relatively minor administrative problems, in all likelihood, can indeed be dealt with by a reasonable regulatory scheme.

### D. *Issues Not Reached by the Court*

The greatest obstacles to even a limited right of access, following from the court's belief in the Commission's ability to regulate the media and hence justify access to it, are those countervailing consequences which the Commission may not be able to effectively control. These elements are what must be considered in striking the balance between the public's first amendment rights and opposing considerations. Two areas of concern invite analysis: the first is the nature of the group seeking access, and the second is the constitutional status of an inadequately funded group seeking access.

Given the broad nature of the court's approval of editorial advertising,

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[83] *Id.* at 22.

[84] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 662 (D.C. Cir. 1971).

[85] *Id.* at 663.

[86] *Id.* at 664.

[87] *Id.*

one must still ask if some things are too controversial to be permitted access. The most obvious example would seem to be obscenity, the presentation of which would be barred under any public issue doctrine because of accepted standards of what may be permissibly broadcast to the general public at large. However, other situations do not lend themselves to such clear cut resolution. If the Klu Klux Klan may be covered on news programs and documentaries, is it to be prohibited from buying commercial time to advertise its view on an unquestionably controversial subject? It is difficult to anticipate how a court might distinguish contexts of permissible controversy, or degrees of controversy beyond which a right of access would not extend. The obvious dilemma that ensues is a right to present that which is morally objectionable to a substantial portion of the audience, and morally humiliating to a particular segment. Many issue oriented groups might conceivably raise such a problem, *e.g.*, the American Nazi Party, the John Birch Society, etc. The FCC would be hard pressed to exclude such groups under any reasonable regulation that would at the same time permit the converse view to be broadcast. Contrarily, if permitted and done "in good taste," as might be possible, the effect on the voluntary sponsorship that supplies a majority of the media's funding could well be devastating.

An even greater problem can be foreseen when one considers the impact of the suspect criterion branch of the new equal protection upon a right of access. The court in *BEM* used this analysis in determining the unconstitutionality of discrimination based upon the content of ideas. However, the United States Supreme Court has also decided that wealth is a suspect criterion,[88] and consequently that, absent a compelling state interest, classifications cannot be made based upon it. Applied to the doctrine under consideration, there would seem to be little doubt that a licensee would be barred from discriminating against a group seeking access solely because that group could not afford to pay the standard fee for advertising. This would produce, in effect, a free right of access for those groups. But how does the licensee determine who, amongst competing under-funded interests, deserves the free time he is required to give? What should be the proper ratio of free time to paid time, and should the criteria include the solvency of the licensee, or the nature of the editorials? These and other substantive problems suggest that "reasonable regulations" may not completely counterbalance the burden of the licensee.

## VI. CONCLUSION

The beginning of this discussion focused upon the shortcomings and inequities of the fairness doctrine itself. Assuming that a limited right of

[88] *See, e.g.*, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963).

access withstands appeal to the United States Supreme Court, its ultimate benefit, notwithstanding the drawbacks noted above, might be most appropriately measured in terms of its effect upon those problems. Definitional difficulties were discussed at the outset, illuminating the vagueness of concepts such as "controversial" and "a reasonable and good faith effort." Does a limited right of access afford any relief in this area? Without question, those who are frustrated by an adverse FCC interpretation of these concepts now have a viable avenue of redress. It is also reasonable to believe that those topics that fell outside the Commission's construction of controversial, for example, religion, so as to render the fairness doctrine inapplicable, are still issues of sufficient public importance to qualify for editorial advertising. This is to say that implicit in a right of access is the fact that it cannot be denied simply because the licensee deems something non-controversial. To reason otherwise would defeat the express first amendment function of a right of access of preserving an "uninhibited, robust, and wide-open"[89] forum for the exchange of ideas. The effect of sanctions available but never used against those who would violate the spirit, if not the letter, of the fairness doctrine is also reduced significantly. The injunctive relief available for improper administration of a right of access will satisfy the complaining party more quickly and more appropriately than disciplinary action under the fairness doctrine. Appeal from FCC rulings and regulations is still possible for those displeased with any application of the new doctrine to their particular situation. One of the most encouraging changes insured by a right of access is that a licensee can no longer avoid controversial subject matter altogether, the bane of those who dispair blandness in the media. Unless he carries no advertising whatsoever,[90] the licensee, even though he still lacks an affirmative obligation to initiate the presentation of controversial issues, now has an obligation to accept at least some editorial advertising. Though subject to reasonable regulation, there can be no doubt that this change signals a new trend for public involvement and influence of its own affairs.

Despite the issues not raised by the FCC and hence not reached by the court, the balance of constitutionality still weighs heavily in favor of the public's right of access. Both the inequity of selling time to commercial manufacturers while denying it to public interest groups, and the unfairness of leaving complete and total editorial control of the most significant means of mass communication in the world in the hands of a few select people persuade one that a right of access is indispensable. Jerome Barron, one of the most noted commentators in the field, has asked "how crucial to the communication at issue is access to the forum in question?"

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[89] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 655 (D.C. Cir. 1971).

[90] An issue not yet resolved is the applicability of a right of access to a licensee who does not accept any paid advertising.

and has answered that "wherever there are public facilities through which large numbers of people can be easily reached, there is a right of access to those facilities by groups interested in using them for purposes of political expression."[91]

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[91] Barron, *An Emerging Right of Access*, 37 GEO. WASH. L. REV. 487, 494 (1969).